Supreme Court U.S.
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No. 02-545

In The

Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

RICHARD K. LOVELL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

Did petitioners waive their Eleventh Amendment immunity when they applied for and accepted federal financial assistance for a medical insurance program and made express representations they would comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and all federal statutes relating to nondiscrimination?

Is Title II of the Americans with Disabilities Act of 1990 a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment? If so, did Congress validly abrogate the states' sovereign immunity against private suits for damages with respect to discrimination in providing federally supported public services?

LIST OF PARTIES

Petitioners, defendants-appellants in the court below, are the State of Hawaii and Susan Chandler in her official capacity as the Director of the Department of Human Services of the State of Hawaii.

Respondents are Richard K. Lovell, Douglas D. Delmendo, an incapacitated person by his appointed guardian Zosima Orillo Delmendo, Helen Y. Hirata, and Albert Lum Ho, Sr., plaintiffs-appellees in the court below.

The United States of America filed a notice exercising its right to intervene pursuant to 28 U.S.C. § 2403(a) in the consolidated *Lovell* and *Delmendo* appeals.

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OPINIONS BELOW

The opinion of the court of appeals in *Lovell v. Chandler* and *Delmendo v. Chandler*, Pet. App. la, is reported at 303 F.3d 1039 (9th Cir. 2002). Unreported memorandum opinions, Pet. App. 34a, 36a, were issued by the court of appeals in *Hirata v. Chandler* and *Lum Ho v. Chandler*. The opinions of the district court in *Lovell* and *Delmendo* are unreported, and are reprinted at Pet. App. 38a, 58a. The judgments entered by the district court in *Hirata* and *Lum Ho* are reprinted at Pet. App. 72a, 73a. The opinion of the district court in *Burns-Vidlak v. Chandler*, granting plaintiffs' summary judgment on liability in favor of the class of which respondents are members, is reported at 939 F. Supp. 765 (D. Haw. 1996), and reprinted in Resp. App. 1.

JURISDICTION

The judgments of the court of appeals were entered on September 5, 2002. The petition for a writ of certiorari was filed on October 8, 2002. Jurisdiction in this case is based on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.* and the Rehabilitation Act Amendments of 1986, Pub. L.

No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 U.S.C. § 2000d-7, are reprinted in Pet. App. 75a-80a.

STATEMENT IN OPPOSITION

Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. § 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. *See* 29 U.S.C. § 794a(a); *Barnes v. Gorman*, 122 S.Ct. 2097 (2002); *Olmstead v. L.C.*, 527 U.S. 581, 590 n. 4 (1999).

In 1985, this Court ruled that § 504 was not clear enough to show Congress' intent to condition federal funding on a waiver of the Eleventh Amendment immunity for private damage suits against state entities. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-246 (1985). The direct and prompt Congressional response was to enact 42 U.S.C. § 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1985), which provides:

> (a) General provision
>
> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A state's Eleventh Amendment immunity was abrogated in 42 U.S.C. § 12202. In *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court held that Congress did not validly abrogate the states' immunity against suit in passing Title I of the ADA.

Last term the Court unanimously held that a state may, by litigation conduct, waive its immunity from suit for money damages. *Lapides v. Bd. of Regents*, 122 S.Ct. 1640, 1644-45 (2002). Such a waiver is not the kind of "constructive" waiver repudiated by *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-681 (1999), but "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness. . . . " *Lapides*, 122 S.Ct. at 1644.

1. Effective August 1, 1994, Hawaii launched a program known as "QUEST" to transform its Medicaid fee-for-service programs to a managed care program. Pet. App. 3a-5a. It sought and received from the United States Department of Health and Human Services ("DHHS") a waiver of specific Medicaid Act provisions, Pet. App. 26a, Resp. App. 5-6, so that it could expand its Medicaid program to include a "gap group" of persons who met Medicaid's income requirements but had assets which exceeded $2,000. Pet. App. 4a, 7a. However, by state regulation it then categorically excluded all otherwise qualified blind or

disabled people from the eligible gap group. Pet. App. 4a-5a.[1] As a result, several hundred blind and disabled people either lost medical benefits they previously received, or were denied the new QUEST benefits afforded to nondisabled persons. Pet. App. 5a, 60a.

2. Shea Burns-Vidlak, a disabled minor, through his next friend Honey Burns, and George Cohn, a blind adult, on behalf of a class of all persons similarly disabled and denied QUEST benefits, filed an action in the district court. They alleged that petitioners' conduct violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.[2] In response to plaintiffs' motion for summary judgment, petitioners raised only three defenses to liability: that they had not discriminated against plaintiffs solely because of disability, that exclusion of the disabled was "necessary to ensure the financial viability of the QUEST program," and that DHHS waived the state's obligation to comply with the ADA and § 504. Pet. App. 6a-7a. Petitioners conceded that Hawaii had "categorically denied" benefits to the class members solely by reason of disability. Resp. App. 14. Petitioners affirmed they did not assert their Eleventh

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[1] Petitioners' statement, Pet. 5, that the Secretary of DHHS approved the exclusion of the blind and disabled from the benefits provided by the QUEST program is erroneous. *See* Pet. App. 26a, 27a.

[2] The initial defendant was Susan Chandler, solely in her official capacity as Director of the Hawaii Department of Human Services. Prior to the hearing on plaintiffs' motion for partial summary judgment, plaintiffs filed a motion to amend the complaint to add the State of Hawaii as a defendant, which was granted. Chandler and the state will be referred to collectively as "Petitioners."

Amendment immunity as a defense to liability. Resp. App. 3. In its decision granting partial summary judgment on liability, the district court granted leave under 28 U.S.C. § 1292(b) for petitioners to seek an interlocutory appeal. Resp. App. 22. Petitioners did not appeal.

3. Prior to the hearing on the motion for partial summary judgment, class representatives filed a motion for class certification. The district court certified the plaintiff class for the purpose of determining liability for compensatory damages and prospectively for the purpose of determining liability for punitive damages. Pet. App. 7a. It directed the individual class members to file individual suits for determinations of actual damages.[3] Pet. App. 8a. Respondents Lovell, Delmendo, Hirata and Lum Ho did so and were awarded general and special damages after trial. Pet. App. 56a, 69a, 72a, 73a.

a. Respondent Richard Lovell was a welder who became disabled as a result of cataracts. Had he not been disabled, he was financially eligible for QUEST dental benefits. Pet. App. 39a-40a. Without the benefits, he was unable to obtain treatment for painfully decayed teeth.

b. Respondent Douglas Delmendo is mildly mentally retarded and schizophrenic. He and his family received QUEST benefits, until he was certified as disabled and received a small lump sum Social Security payment, after

[3] Petitioners' statement, Pet. 6, that class members sought in excess of $10,000,000 in damages is unsupported in the record.

which his benefits were cut off, although his family remained eligible. Pet. App. 60a-61a.

c. Respondents Helen Hirata and Albert Lum Ho were also disabled persons who were denied medical assistance benefits under the QUEST program. Pet. App. 34a, 36a.

4. The court of appeals consolidated the *Lovell* and *Delmendo* appeals. On appeal, petitioners argued that the appellate court had no jurisdiction under 28 U.S.C. § 1291 as there was no final judgment in the underlying class action. Pet. App. 12a-14a. Despite their earlier waivers, petitioners briefly raised the issue of Eleventh Amendment immunity to the ADA and § 504 claims for the first time in the initial round of briefing on appeal, but acknowledged that the Ninth Circuit had previously rejected a claim of state immunity to ADA and Section 504 claims. Pet. C.A. Br. 39. After this Court held in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate states' immunity to suits alleging disability discrimination in employment under Title I of the ADA, 42 U.S.C. §§ 1211 *et seq.*, the court of appeals ordered supplemental briefing for the limited purpose of addressing the impact of recent decisions on arguments already made concerning the Eleventh Amendment immunity of the petitioners. Resp. App. 31. The United States then intervened on appeal in *Lovell* and *Delmendo*, pursuant to 28 U.S.C. § 2403(a), and petitioners were permitted to file a brief responding to the United States. The court of appeals affirmed the decision of the district court in its entirety. Pet. App. 33a.

With regard to the § 504 claim, the court followed, Pet. App. 16a, its recent decision in *Douglas v. California*

Department of Youth Authority, 271 F.3d 812 (9th Cir. 2001), holding that Congress validly conditioned a state's receipt of Section 504 funding on its consent to waive Eleventh Amendment immunity. With regard to the ADA, the court followed its recent decision in *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002), *reh'g and reh'g en banc denied,* 294 F.3d 1166, *pet. for cert. granted*, No. 02-479 (U.S. November 18, 2002), finding the Eleventh Amendment does not bar claims against a state under Title II. Pet. App. 16a. It did not reach the issue whether Congress exceeded its Section 5 powers by abrogating the states' immunity to Section 504 damages claims. The decision of the court of appeals was unanimous. Petitioners did not seek rehearing.

5. The court of appeals affirmed the district court's holding in *Burns-Vidlak* that there was no material fact in dispute with respect to petitioners' violations of Section 504 and Title II, Pet. App. 19a, and as class members, respondents were entitled to recover compensatory damages, Pet. App. 30a.[4]

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[4] The court of appeals addressed the substantive defenses raised in all four appeals in its opinion in the consolidated *Lovell* and *Delmendo* appeals. However, separate memorandum opinions were issued in *Hirata* and *Lum Ho*. Pet. App. 34a-36a.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' CHALLENGE TO APPELLATE JURISDICTION MAKES THIS CASE INAPPROPRIATE FOR REVIEW

In the circuit court, petitioners argued at length that the court did not have appellate jurisdiction under 28 U.S.C. § 1291 because all claims of respondents were not resolved by the trial court, and that the appeal was filed only "in an abundance of caution." Pet. App. 9a. The court of appeals held that "[T]he fact that the decisions in these separate actions incorporated by reference the reasoning and result of the *Burns-Vidlak* partial summary judgment does not make their judgments any less final," and further, that an appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment. Pet. App 12a. It then addressed the merits of the *Burns-Vidlak* liability decision. Pet. App. 11a. While respondents believe the court of appeals properly rejected the jurisdictional challenge, this complicated antecedent issue impedes the clear resolution of this case on its constitutional merits, and renders this case inappropriate for review.

II. THERE ARE INDEPENDENT BASES FOR THE COURT OF APPEALS' RULING

The petition seeks review of two independent statutory bases for the court of appeals' affirmance of the district court's rulings. It does not seek review of a third independent basis upon which the district court's judgments can be sustained. Unless the Court finds that Congress does not have the authority under Section 5 of the Fourteenth Amendment to abrogate the state's sovereign immunity

from suit for violations of Title II of the ADA *and* finds that the request for and acceptance of conditioned federal funds is not a Spending Clause waiver of the state's immunity to suit for damages for violation of Section 504, *and* finds that Hawaii did not expressly waive its immunity, the court of appeals' ruling will be affirmed.

III. ON MULTIPLE OCCASIONS, PETITIONERS WAIVED SOVEREIGN IMMUNITY PROTECTIONS

There are multiple waiver issues which render this case inappropriate for consideration. "The Eleventh Amendment . . . does not automatically destroy original jurisdiction. . . . Nor need a court raise the defect on its own. Unless the state raises the matter, a court can ignore it." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). A state will waive its Eleventh Amendment protection if it either asserts claims of its own, *see Lapides*, 122 S.Ct. at 1643-44, or evidences a clear intent to defend the suit on the merits, *College Savings Bank*, 527 U.S. at 675-76, *citing Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 274, 284 (1906); *and quoting Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). This issue was raised in the court of appeals, but because the court of appeals upheld the constitutionality of the abrogation provisions, it did not reach the waiver issues. Pet. App. 18A.

In the district court, petitioners asserted sovereign immunity as a defense to the § 1983 claim only. Resp. App. 3. Before the district court issued its ruling, this Court

held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress lacks the power under Article I to subject the states to private damage suits in federal court. Although petitioners were afforded the opportunity to seek leave to immediately appeal the partial summary judgment, Resp. App. 22, they did not do so. Approximately a year later, petitioners sought summary judgment on the grounds that the Eleventh Amendment barred the class claims for punitive damages, Resp. App. 25, and appealed the denial of their motion. *See Burns-Vidlak v. Chandler*, 165 F.3d 1257 (9th Cir. 1999). The court of appeals dismissed the appeal on jurisdictional grounds, holding: "In the instant case, the State is not claiming sovereign immunity from suit in federal court. In fact, the State concedes that it is subject to suit, and answerable in money damages in federal court on the appellees' Title II and Section 504 claims." Resp. App. 28.

In its answer to the individual damages complaints filed in response to the *Burns-Vidlak* order, petitioners did assert that the complaint was barred by the doctrine of sovereign immunity "where such doctrine applies," and by the Eleventh Amendment "where such Amendment applies." Pet. App. 82a, 84a, 86a, 88a. Thereafter, petitioners defended those cases on the merits.[5] In their opening brief on appeal, Pet. C.A. Br. [1]-2, petitioners identified only two issues on appeal: whether there were material facts in dispute concerning liability, and whether there were material facts in dispute concerning damages.

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[5] The district court in *Lovell* and *Delmendo* affirmed that liability was decided in the *Burns-Vidlak* action. Pet. App. 53a-54a, 66a.

Litigation conduct such as that engaged in by petitioners has long been held to waive sovereign immunity. This Court in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916) said: "Whatever might have been the merit of [defendants' immunity] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." The *Richardson* decision relied on an earlier ruling in *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which the Court held "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." *Id.* at 632. Petitioners expressly abandoned the opportunity to assert the immunity defense in the district court, and the belated and opaque assertion of the claim thereafter threatens the type of "inconsistency, anomal[ies], and unfairness" and "unfair tactical advantage[s]" that this Court recently held the Eleventh Amendment does not condone. *Lapides*, 122 S.Ct. at 1644-1645; *see also Wisconsin Dep't of Corr.*, 524 U.S. at 394 (Kennedy, J., concurring) ("In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.") The existence of this dispositive question, undeveloped in the record below, is a significant potential obstacle to the Court's resolution of the Eleventh Amendment questions presented.

IV. THE DECISION OF THE COURT OF APPEALS UPHOLDING § 2000d-7 WAIVERS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The decision of the court of appeals as to Section 504 is correct and does not conflict in any substantial respect with any decision of this Court. The decision of the court of appeals stated that the petitioners' arguments on the sovereign immunity issue were foreclosed by the court's decision in *Douglas v. California Dept. of Youth Auth.*, 271 F.3d at 820. A petition for certiorari was filed in *Douglas*, and was denied by this Court on other grounds. 122 S.Ct. 2591 (2002). This Court has denied a petition for a writ of certiorari in a number of other cases presenting virtually identical Eleventh Amendment issues. *See Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 2588 (2002); *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001); and *George Mason University v. Litman*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000).

1. Petitioners' ambiguity argument was never raised below, and is negated by *Lane v. Pena*

Petitioners argue that § 2000d-7 is ambiguous, failing to give requisite notice to Hawaii that its request for and acceptance of Medicaid funds would subject it to suit for damages in federal court. This notice argument is foreclosed by the decisions of this Court, as well as by petitioners' own position in this case. First, petitioners argue, Pet. at 21, that *Lane v. Pena*, 518 U.S. 187 (1996), supports their contention that § 2000d-7 is ambiguous. Section 2000d-7 was enacted in response to the Supreme

Court's holding in *Atascadero State Hosp.*, 473 U.S. 234 (1985), that Congress had not unmistakably expressed its intent to abrogate the states' Eleventh Amendment immunity in the Rehabilitation Act, and that the states, accordingly, were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504." *Atascadero* at 235. In *Lane*, however, this Court acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. 518 U.S. at 200. This express language in *Lane*, which petitioners do not address, disposes of petitioners' ambiguity argument. There is no question that under *Lane* money damages for violations of Section 504 are available against the states, and petitioners' contention, Pet. at 26, that "[b]ecause *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against the States," is clearly wrong. Moreover, petitioners' contention that § 2000d-7 is ambiguous could not be accepted without this Court reversing numerous recent decisions in addition to *Lane*, including *Alexander v. Sandoval*, 532 U.S. 275, 279-280 (2001) (Section 2000d-7 ratifies the holding in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), that private individuals may sue to enforce Section 601 of Title VI and obtain both injunctive relief and damages); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (a private right of action exists to enforce Title IX of the Education Amendments); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (Section 2000d-7 "cannot be read except as a validation of *Cannon*'s holding."); *see also id.* at 78 (Scalia, J., concurring in judgment).

Petitioners never urged their interpretation of *Lane* below. To the contrary, petitioners admitted that if they had violated § 504, they would be liable for money damages, Resp. App. 12. In the court of appeals, petitioners made no argument that the language of § 2000d-7 was ambiguous, but asserted instead that Congress clearly intended to impose "its harshest possible remedies" on states. Pet. Br. In Response to Intervenor's Br. C.A. at 2-3. Moreover, although they now say, Pet. 21, that their claim follows directly from *Lane v. Pena*, petitioners have not pointed to any decision by any court in the last six years that has adopted, or even addressed, the argument that they now press. This Court should not grant further review to address such a question of first impression, before there has developed any division of authority – or even any discussion of the issue – in the courts of appeals.

2. Petitioners failed to argue below that the ADA's abrogation provisions deprived them of a meaningful waiver choice

Petitioners rely on the Second Circuit's decision in *Garcia v. State University of New York Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001), to argue that the waiver provisions of 42 U.S.C. § 2000d-7 are ambiguous. Pet. 24-25. In the court of appeals, C.A. Br. 38-40, petitioners' argument was that Section 504 was not Spending Clause legislation at all, but rather was an improper exercise of Congress' authority under Section 5 of the Fourteenth Amendment. This argument is now foreclosed by this Court's decision in *Barnes v. Gorman*, 122 S.Ct. 2097, 2103 n. 3 (2002) (stating that the Rehabilitation Act is Spending Act legislation). Therefore, petitioners' arguments in their petition were not presented to, nor addressed

by, the court of appeals.[6] This Court does not ordinarily grant review to consider questions that were neither pressed, nor passed upon, below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *see also United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 217 (1990). This is a court of "review, not one of first view," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995), and the failure of the petitioners to press these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). These principles are particularly compelling in a case like this because this Court could not even reach the Section 504 question raised by the petitioners without first addressing and resolving abrogation of immunity issues under Title II of the ADA.

Petitioners contend, Pet. 22, that § 2000d-7 which passed in 1986, is not effective because Congress, several years later, abrogated the states' immunity from suits for discrimination under Title II so that Hawaii lacked any

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[6] After oral argument in a letter dated October 22, 2001 to the court of appeals pursuant to Fed. R. App. P. 28(j), petitioner notified the panel of the *Garcia* holding that "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity," and asserted this holding supported the arguments set forth at pp. 16-24 of the State's Brief in Response to the Brief of Intervenor United States. However, in this third round of briefing in the court of appeals, as in the earlier briefs, petitioners did not assert that § 2000d-7 was ambiguous. They only argued that § 2000d-7 was invalid under Section 5 of the Fourteenth Amendment, and that if it was also Spending Clause legislation, the dual source of authority made it ambiguous. C.A. Br. 21-24.

meaningful choice of retaining its immunity. Pet. at 23. In addition to the fact that this argument was not briefed in, or addressed by, the court of appeals, petitioners' argument is without merit because every state agency did know from the plain text of Section 2000d-7, from the time it was enacted, that acceptance of federal funds constituted a waiver of immunity from suit for violation of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990 (which was not effective until 1992), and it was clear that plaintiffs could sue under either statute. *See Koslow v. Pennsylvania*, 302 F.3d 161, n. 12 (3d Cir. 2002), *citing* 42 U.S.C. § 12201(b) (preserving existing causes of action).

V. THIS CASE IS NOT APPROPRIATE FOR REVIEW OF CONGRESS' AUTHORITY TO ABROGATE A STATE'S IMMUNITY UNDER TITLE II OF THE ADA

There is a split in the circuits concerning the validity of Congress' abrogation of states' Eleventh Amendment immunity to suits brought under Title II. The Ninth Circuit in *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002), *cert. granted,* No. 02-479 (U.S. November 18, 2002), has upheld the validity of the abrogation provision. The Fourth Circuit, in *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002), Fifth Circuit, in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001), Seventh Circuit in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 513 U.S. 1190 (2001), Eighth Circuit in *Aulsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. dismissed*, 529 U.S. 1001 (2000), and Tenth Circuit, in *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1960 (2002), have held the abrogation provisions

invalid. Three other circuits have upheld Congress' authority in certain instances. *See Garcia v. SUNY Health Services Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (Title II comports with Congress's § 5 authority to the extent the Title II violation was motivated by discriminatory animus); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied* No. 01-1503 (U.S. Oct. 7, 2002) (Title II can validly abrogate a state's Eleventh Amendment immunity when the claim at issue implicates due process rights); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (Title II may validly abrogate immunity in cases in which a court identifies a constitutional violation by the state).

Presumably the Court will address this issue in *Hason, supra*. Irrespective of the ruling in *Hason*, this case, however, is not one in which the Court can clearly address those conflicts, because of issues raised concerning appellate jurisdiction, because petitioners waived the right to assert sovereign immunity as a defense and failed to present these issues on appeal, and because Section 504 constitutes an alternative wholly adequate and independent basis for the court of appeals' ruling. Other cases present far better opportunities for this Court to address the split in the circuits on the scope of immunity to Title II claims.[7] Sound principles of judicial restraint counsel against review of this case.

[7] In addition to *Hason, supra*, the Ninth Circuit affirmed its support of Title II in *Thomas v. Nakatani*, 309 F.3d 1203 (9th Cir. 2002).

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

December 9, 2002

Respectfully submitted,

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APPENDIX 1

Shea T. BURNS-VIDLAK, a minor, by his mother and next friend, Honey BURNS, and George Cohn, Plaintiffs,

v.

Susan, CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, Defendant.

Civil No. 95-00892 ACK.

United States District Court,
D. Hawai'i.,

April 12, 1996.

Bradford L. Tannen, Alston Hunt Floyd & Ing, Honolulu, HI, for plaintiffs.

Susan Barr, G. Cher Foerster, Office of the Attorney General, State of Hawaii, Honolulu, HI, for defendant.

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

KAY, Chief Judge.

BACKGROUND

This case involves a suit against defendant Susan Chandler, in her official capacity as the State of Hawaii's Director of Human Services, on the grounds that the State's QUEST health care program, prior to April 1,

1996,[1] violated the anti-discrimination provisions of the Rehabilitation Act and the Americans with Disabilities Act ("ADA") by categorically excluding similarly situated blind and disabled individuals from participation. Plaintiffs Shea T. Burns-Vidlak, by his mother and next friend Honey Burns, and George Cohn (collectively "Plaintiffs") also contend that the State is liable under 42 U.S.C. § 1983 because the program violated the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs filed their original complaint on November 2, 1995 and an amended complaint on January 29, 1996. On February 14, 1996, Plaintiffs filed their instant motion for partial summary judgment or, in the alternative, for preliminary injunctive relief. Plaintiffs seek partial summary judgment on the grounds that (1) the QUEST program violated the Rehabilitation Act, the ADA, and § 1983 and (2) therefore the State is liable for compensatory damages in an amount to be determined later. Plaintiffs also seek the Court to preliminarily enjoin the State from excluding Plaintiffs from receiving benefits under QUEST.

On March 4, 1996, the State filed an opposition and Plaintiffs filed a motion for class certification, which currently is scheduled for hearing on June 10, 1996. On March 11, 1996, Plaintiffs filed a reply.

This matter came before the Court for hearing on March 18, 1996. At the hearing, the parties agreed that the issue of injunctive relief would be mooted if the State implemented as planned, on April 1, 1996, an across-the-board

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[1] Unless indicated otherwise, any reference to the "QUEST" program shall refer to that program as it existed prior to April 1, 1996.

asset test for participation in the QUEST program which would eliminate any discrimination against similarly situated blind and disabled applicants. This nondiscriminatory asset test would be identical to that used for aged/blind/disabled ("ABD") recipients under Medicaid. Also on April 1, 1996, the State planned to implement its new "QUEST-Net" program, which would provide limited coverage for former QUEST and ABD recipients with more assets than allowed under Medicaid. QUEST-Net was designed not to discriminate against blind or disabled individuals solely on the basis of their disability.

The Court accordingly ordered the State to submit a report by April 8, 1996 on the implementation of changes to QUEST and of QUEST-Net and allowed Plaintiffs three days to respond. The State's report, filed April 8, 1996, indicates that neither QUEST as modified nor QUEST-Net denies coverage for blind or disabled individuals solely on the basis of their disability.[2]

Plaintiffs' "Second Supplemental Memorandum," filed April 11, 1996 in response to the State's report, states that they "do not dispute Defendant's factual statement of the current status of the proposed QUEST and QUEST-Net regulations." Plaintiffs' Second Supp. Mem. at 2. However,

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[2] The State's report also includes an unrequested and irrelevant discussion of qualified immunity. *See Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985) (qualified immunity not available as a defense in an official-capacity action). The Court does not appreciate such behavior and does not condone taking advantage of an opportunity to respond to a specific request from the Court by raising other matters without prior approval. Moreover, at the hearing, the State admitted that if it violated § 504 of the Rehabilitation Act, it is liable to Plaintiffs for damages.

Plaintiffs contend the issue of injunctive relief is not moot because the State has not indicated (a) whether and when the federal Health Care Financing Administration ("HCFA") approved these new regulations; and (2) whether all qualified applicants (including blind and disabled individuals) are currently receiving coverage under these programs.

The Court disagrees with Plaintiffs. First, even assuming the new regulations have not been approved by HCFA, the State already has implemented them, and they are in effect. *See* Defendant's Supp. Mem. at 2 ("The modifications to QUEST Phase I and the new QUEST-Net program went into effect as of March 30, 1996, and all QUEST participants are subject to an asset test at this time."). Plaintiffs may bring a subsequent motion for injunctive relief in the event these new regulations are found to be invalid and the State reverts to a program which impermissibly discriminates against Plaintiffs. Second, the State has indicated that all qualified individuals, including those blind and disabled, *may* receive coverage under QUEST-Net or the modified QUEST program at this time if they so choose, and, in any event, this action has not been certified as a class action at this time.

The Court accordingly dismisses as moot at this time Plaintiffs' claim for injunctive relief. The only remaining issue is the State's liability for damages.

FACTS

The State of Hawaii Department of Human Services ("DHS") formed QUEST in order to broaden the health care services and coverage provided to Hawaii residents.

QUEST integrates the preexisting fee-for-service health care plans utilized for recipients under Medicaid, AFDC, SHIP, and GA programs. Under QUEST these recipients will now receive health care through privatized managed-care health care providers rather than on a fee-for-service basis.

Phase I of the QUEST program was approved by the United States Health Care Financing Administration ("HCFA") in July 1993. Because QUEST is a pilot or "demonstration" program, HCFA granted waivers to the State of Hawaii under 42 U.S.C. § 1315 of certain statutory requirements for state health care programs mandated by 42 U.S.C. § 1396a. (Defendant's Opp., Exh. B.) In the program proposal submitted by DHS to the United States Secretary of Health and Human Services, Donna Shalala, DHS revealed the details of the QUEST program, including the fact that QUEST would not cover the aged, blind and disabled ("ABD") population. (Defendant's Opp., Exh. A at 5-1.) [3]

QUEST went into effect on August 1, 1994. Under Phase I of QUEST as it existed prior to April 1, 1996, Hawaii residents were eligible for health care coverage under QUEST if they met certain income requirements and were not blind or disabled. There was no asset limitation, although there is one now for QUEST and under QUEST-Net. Specifically, residents could participate if they earned no more than 300% of the federal poverty

[3] DHS' application to the SSA for a waiver recited that the QUEST program would comply with the Rehabilitation Act and the ADA. *See* Opp., Exh. E.

level and were not certified as blind or disabled. Those who were blind or disabled could not receive benefits under QUEST but could continue to receive health benefits under Medicaid if they satisfied its more stringent income and asset limits. Under Medicaid, income cannot exceed 100% of the federal poverty level and assets cannot exceed $2000 for a family of one or $3000 for a family of two (for families larger than two, the asset limit increases by $250 for each additional family member).

Plaintiffs claim they applied to the QUEST program and were excluded solely on the basis of their disabilities. Both plaintiffs are disabled: plaintiff Burns-Vidlak is a 16-year old disabled individual and plaintiff Cohn is legally blind. (Plaintiff's Concise Stmt. at 5.) In addition, Plaintiffs do not meet the asset limits under Medicaid: both were denied benefits under Medicaid because they do not satisfy the asset limits imposed by Medicaid.

Effective April 1, 1996, DHS has amended Phase I of QUEST to impose the same asset test as under Medicaid. However, the income limit under QUEST remains at 300% of the federal poverty level. In addition, DHS has implemented the QUEST-Net program to extend coverage to the blind and disabled population as well as others who do not qualify under the amended QUEST program. (Defendant's Opp. at 8.) QUEST-Net applies a more lenient asset test to extend coverage to those who do not satisfy the Medicaid asset limits under the amended QUEST program but provides fewer benefits.

In July 1997, DHS plans to begin Phase II of the QUEST program, which is expected to cover more individuals (including more of the ABD population) under

managed care. Phase II is not expected to deny benefits solely on the basis of blindness or disability.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

Rather, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv.,* 809 F.2d at 630. At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of

fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir.1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America,* 815 F.2d 1285, 1289 (9th Cir.1987) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Anderson,* 477 U.S. at 250-51, 106 S.Ct. at 2511.

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir.1987). Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Indeed, "if the factual context makes the nonmoving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468 (emphasis in original) (citing *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 630-31.

DISCUSSION

I. *CLAIMS UNDER REHABILITATION ACT AND ADA*

Plaintiffs first claim that QUEST violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the ADA, 42 U.S.C. § 12132.

A. *Legal Standards*

Both the Rehabilitation Act and the ADA prohibit discrimination on the basis of disability. The Rehabilitation Act proscribes discrimination in all federally-funded programs, whereas the ADA applies only to public entities.

The Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Similarly, the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

In order to obtain relief under section 504 of the Rehabilitation Act, a plaintiff must show (1) that he is handicapped within the meaning of the Act; (2) that he is otherwise qualified for the services sought; (3) that he was excluded from the services sought solely by reason of his handicap; and (4) that the program in question receives federal financial assistance. *Dempsey v. Ladd,* 840 F.2d 638, 640 (9th Cir.1987); *Bonner v. Lewis,* 857 F.2d 559, 562-63 (9th Cir.1988); *Smith v. Barton,* 914 F.2d 1330, 1338 (9th Cir.1990).

Likewise, to establish a violation under the ADA the plaintiff must show (1) she is a qualified individual with disabilities; (2) she was either excluded from participation in or denied benefits of some public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability. *Tyler v. City of Manhattan,* 857 F.Supp. 800 (D.Kan. 1994).[4]

The Code of Federal Regulations has outlined a narrow exception for when discrimination is allowed under the Rehabilitation Act and the ADA. Under both acts, classification of benefits or discrimination on the basis of disability are allowed only when "necessary." For example, under the ADA:

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[4] *See also Voytek v. Univ. of California,* 1994 WL 478805 (N.D.Cal.1994), *aff'd,* 1996 WL 65243 (9th Cir.1996) (unpublished) (affirming grant of summary judgment on grounds plaintiff failed to establish prima facie case under Rehabilitation Act and noting the parties "conceded the elements of the ADA are identical to the requirements of proof under section 504 of the Rehabilitation Act").

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be *necessary* for the *provision of the service, program, or activity being offered.*

28 C.F.R. § 35.130(b)(8) (emphasis added).

The Section analysis of this provision in Appendix A to Part 35 states:

> This prohibition [in 28 C.F.R. § 35.130(b)(8)] *prohibits overt denials* of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.
>
> . . . .
>
> In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. . . . A public entity may, however, impose *neutral* rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are *necessary for the safe operation* of the program in question . . . . Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

28 C.F.R. Ch. 1, Pt. 35, App. A, Analysis of § 35.130(b)(8) (July 1, 1994 ed.) (emphasis added).

Similarly, under the Rehabilitation Act:

> A recipient [of Federal financial assistance], in providing any aid, benefit, or service, may not, . . . on the basis of handicap: . . . [p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is *necessary* to provide qualified handicapped persons with aid, benefits, or services that are *as effective as those provided to others* . . . .

45 C.F.R. § 84.4(b)(1)(iv) (emphasis added).

The Ninth Circuit has held that Section 504 of the Rehabilitation Act "'provide[s] handicapped victims of government discrimination a private right of action for damages against the government discriminator[,]' . . . [and] allows (1) both monetary and non-monetary relief (2) against the federal government or entities receiving federal funds (3) without an exhaustion requirement." *J.L. v. Social Sec. Admin.*, 971 F.2d 260, 264 (9th Cir.1992) (quoting *Doe v. Att'y Gen'l of the United States*, 941 F.2d 780, 789 (9th Cir.1991)). The State has admitted that if it violated section 504, it is liable to Plaintiffs for damages.

The same would appear to hold for violations of the ADA, inasmuch as 42 U.S.C. § 12133, the enforcement provision for violations of § 12132 (ADA), states that remedies for violations of § 12132 shall be those set forth in 29 U.S.C. § 794a, the enforcement provision for violations of § 504 of the Rehabilitation Act. *See* 42 U.S.C. § 12117(b) (mandating that agencies coordinate standards under ADA and Rehabilitation Act so as not to produce inconsistencies); *Vande Zande v. State of Wisconsin Dept. of Admin.*, 851 F.Supp. 353, 359 (W.D.Wis. 1994) (ADA to be interpreted consistently with Rehabilitation Act);

Rivera Flores v. Puerto Rico Tel. Co., 776 F.Supp. 61 (D.Puerto Rico 1991) (noting that Title II of ADA "adopts the remedies found in the enforcement provisions of § 505 of the Rehabilitation Act"); *Torcasio v. Murray,* 57 F.3d 1340, 1342-43 n. 2 (4th Cir.1995) (assuming without deciding that monetary damages available for violations of both Rehabilitation Act and ADA).

Finally, states have no Eleventh Amendment immunity from suit in federal court for violations of § 504 of the Rehabilitation Act or the ADA. *See* 42 U.S.C. § 2000d-7(a)(1) (Rehabilitation Act and ADA); 42 U.S.C. § 12202 (ADA).

B. *Application*

Plaintiffs contend that the following undisputed facts, which the State conceded at the hearing were undisputed,[5] require granting summary judgment in their favor:

1. Plaintiffs are disabled;
2. the State denied each of the Plaintiffs health care coverage under QUEST solely on the basis of their disability;
3. Plaintiffs were otherwise qualified, aside from their disabilities, to receive coverage under QUEST;
4. QUEST receives federal financial assistance;

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[5] Later on during the hearing, Defendant retracted her concession as to fact number 2.

5. QUEST did not, until April 1, 1996, impose an asset restriction to receive coverage; and

6. Medicaid does impose an asset restriction to receive coverage, such that Plaintiffs are rendered ineligible for coverage under Medicaid.

The Court agrees. Plaintiffs have demonstrated, and the State concedes, that they were categorically denied coverage under QUEST, in comparison with nondisabled individuals in the same financial situation (that is, having similar income and assets), solely by reason of their disability. The State advances several arguments why it is not liable. None succeed.

1. *"Solely" By Reason of Disability*

First, the State argues that Plaintiffs were not discriminated against *solely* because of their disability but on the basis of financial criteria *plus* their disability, citing *Johnson v. Thompson,* 971 F.2d 1487, 1493 (10th Cir.1992), for the proposition that where "others with the same handicap do not suffer the discrimination, then the discrimination does not result 'solely by reason of [the] handicap.'" The State argues that because blind and disabled individuals with fewer assets were eligible for Medicaid, the discrimination was not based *solely* on disability.

The Court is not persuaded. First, QUEST categorically discriminated against *all* blind and disabled individuals, regardless of their financial circumstances. That some with fewer assets were protected by Medicaid does not negate the discrimination by QUEST. Second, in *Johnson,* the plaintiffs were discriminated against *in*

relation to other similarly disabled individuals by reason of their low socioeconomic status. *Id.* at 1493. Had the plaintiffs in *Johnson* been more *affluent,* they would not have been discriminated against. Here, in contrast, Plaintiffs were discriminated against in relation to other similarly situated *nondisabled* individuals – had Plaintiffs here been *nondisabled,* they would have received coverage under QUEST. Accordingly, the Court finds that discrimination under QUEST was solely by reason of Plaintiffs' disability.[6]

2. *HCFA Waiver*

The State also argues it is not liable for any violations of the Rehabilitation Act or the ADA by reason of the waiver for the QUEST program it obtained from HCFA. The State contends that the HCFA waiver implicitly exempted QUEST from the anti-discrimination provisions of the Rehabilitation Act and the ADA, although it concedes that HCFA has no express authority to effect such a waiver. *See* Opp., Exh. E (application for waiver recites that program will comply with Rehabilitation Act and ADA).

In July 1993, the State received approval for its QUEST program from HCFA. In conjunction with its approval, HCFA granted to the State waivers of certain statutory requirements under 42 U.S.C. § 1396(a) for

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[6] Defendant also argued at the hearing that QUEST, as a new demonstration program, did not *exclude* Plaintiffs but simply *included* certain classes of individuals, not including Plaintiffs. This "the cup is not half-empty, it's half-full" argument lacks merit.

"state plans for medical assistance." These waivers are authorized under 42 U.S.C. § 1315. Among other things, HCFA granted QUEST a "uniformity" waiver for the provision in 42 C.F.R. § 431.50 which requires uniformity of state Medicaid plans for all services and all eligible recipients. HCFA granted this waiver specifically because the "SSI beneficiaries" excluded from QUEST's "non-demonstration" population – that is, the ABD population as defined under Subchapter XVI of the Social Security Act, 42 U.S.C. § 1382 – will receive benefits under Medicaid whereas the non-ABD "demonstration" population will receive modified benefits under QUEST. (Defendant's Opp., Exh. A at 6-1.)

The Court does not agree that the HCFA waiver waived compliance by the State with the Rehabilitation Act and the ADA. First, 42 U.S.C. § 1315 authorizes waivers only for requirements under 42 U.S.C. §§ 302, 602, 654, 1202, 1352, 1382, and 1396a – the Rehabilitation Act and the ADA are not included. Second, none of the statutes for which § 1315 authorizes waivers contain anti-discrimination provisions.

Finally, it does not appear that the Social Security Administration has the authority to waive a state's compliance with the Rehabilitation Act or the ADA. *See J.L. v. Social Sec. Admin.*, 971 F.2d 260, 268 (9th Cir.1992) ("SSA has no discretion to violate the Rehabilitation Act."); *see also Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be *defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled* [.]") (emphasis

added). Although *J.L.* involved the SSA's own regulations, its authority to "waive" compliance with anti-discrimination requirements would seem to be greater when regulating itself than when regulating others (that is, states). The Court accordingly finds that the HCFA waiver did not waive the State's requirement to comply with the Rehabilitation Act and the ADA.

3. *"Necessity"*

Finally, the State contends the "necessity" exceptions outlined in the Code of Federal Regulations absolve the State of liability. The State argues that QUEST does not violate the Rehabilitation Act or the ADA because it is "necessary" to exclude disabled individuals to ensure the financial viability of the program, citing at the hearing 45 C.F.R. § 84.4(b)(1)(iv) (Rehabilitation Act), quoted above in Section I.A., and 28 C.F.R. § 35.130(b)(1)(iv) (ADA).[7]

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[7] 28 C.F.R. § 35.130(b)(1)(iv) provides:

> A public entity, in providing any aid, benefit, or service, may not, . . . on the basis of disability, [p]rovide different or separate aids, benefits, or services to individuals with disabilities . . . than is provided to others unless such action is *necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others*[.]

Id. (emphasis added).

The Section Analysis of this paragraph states:

> Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an *equal opportunity* to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as

(Continued on following page)

In particular, the State claims that in order to move from a fee-for-service health care plan to a managed health care plan like QUEST, QUEST needed to exclude the ABD population because the private health care providers to be utilized under QUEST lacked actuarial data on this group and, as a result, might have shied away from participating. Moreover, the ABD population purportedly has substantially higher health costs than the non-ABD population, so including the ABD group in the QUEST plan could particularly risk the financial viability of QUEST. *See* Defendant's Opp., Exh. C at i (noting that health care costs for the average ABD individual are 150% higher than for those in the AFDC, AFDC-related, GA and SHIP groups).[8]

Both provisions cited by the State however prohibit the provision of *different or separate* benefits to disabled individuals unless "such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others." Moreover, even where such different or separate benefits are provided to disabled individuals, they must be given

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> those provided to others. . . . Even when separate or different aids, benefits, or services would be more effective, . . . a qualified individual with a disability *still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities.*

28 C.F.R. Ch. 1, Part 35, App. A, Section Analysis of § 35.130(b)(1)(iv) (July 1, 1994 ed.) (emphasis added).

[8] The Court notes however that at the hearing, the State admitted that raw actuarial data on the ABD population was available in computer format prior to the implementation of QUEST.

an "equal opportunity" and the right to participate in the program that was not designed for them.

First, it is clear that the State's "financial viability" argument fails as a matter of law. This is not a case where Plaintiffs were offered participation in a separate program in order to provide them with benefits just as effective as those provided to nondisabled individuals but still given the right to "opt out" of the separate program and participate instead in the general population program. Instead, Plaintiffs both were categorically excluded from participation in QUEST and were not offered participation in a separate program "as effective" as QUEST.

Second, even if the State were to rely on 28 C.F.R. § 35.130(b)(8), which prohibits discrimination unless "necessary for the provision of the service . . . being offered," the section analysis of this provision makes clear, as Plaintiffs point out, that this provision "prohibits overt denials of equal treatment of individuals with disabilities."[9]

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[9] At the hearing, Defendant appeared to have abandoned her reliance on this provision in light of the language quoted. Plaintiffs argued that pursuant to 28 C.F.R. § 35.130(b)(8), (1) overt discrimination is prohibited and (2) neutral rules having a "disparate impact" may be allowed but (3) only if such neutral rules are "necessary for the *safe operation* of the program in question." 28 C.F.R. Ch. 1, Part 35, App. A, Section Analysis of § 35.130(b)(8) (July 1, 1994 ed.) (emphasis added). The Court agrees that the language of the section analysis supports Plaintiffs' interpretation.

II. *SECTION 1983*

In addition to their Rehabilitation Act and ADA claims, Plaintiffs also seek damages[10] under 42 U.S.C. § 1983 on the grounds that QUEST violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against the blind and disabled.[11]

First, the Court notes it has found that Plaintiffs may recover under the Rehabilitation Act and the ADA directly. The Court also finds that Plaintiffs' § 1983 claims for damages are barred by the Eleventh Amendment. *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979) (§ 1983 does not override traditional sovereign immunity of states under Eleventh Amendment); *Blaylock v. Schwinden,* 862 F.2d 1352, 1353-54 (9th Cir.1988) (damages claims against state officials sued in their official capacities are barred by sovereign immunity); *Eisfelder v. Michigan Dept. of Natural Resources,* 847 F.Supp. 78, 82 (W.D.Mich.1993) (dismissing § 1983 claim under Eleventh Amendment but retaining claims under Rehabilitation Act and ADA).[12]

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[10] As discussed above, their claim for injunctive relief is moot.

[11] To the extent Plaintiffs base their § 1983 claim solely on a violation of the Rehabilitation Act or the ADA, it appears unsettled in the Ninth Circuit whether these acts provide a sufficiently comprehensive remedial structure so as to bar, under *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), § 1983 claims based on their violation. *See Smith v. Barton,* 914 F.2d 1330, 1335 (9th Cir.1990) (noting "disagreement over whether Congress intended to foreclose section 1983 claims that could have been brought under the Rehabilitation Act").

[12] Suits against state officers for declaratory or injunctive relief are not barred by the Eleventh Amendment, even if the injunctive relief

(Continued on following page)

CONCLUSION

For the foregoing reasons the Court GRANTS IN PART Plaintiffs' motion for partial summary judgment. The Court finds that Plaintiffs are entitled to recover damages under the Rehabilitation Act and the ADA for discrimination under QUEST prior to its amendment on March 30, 1996.[13] The Court DISMISSES Plaintiffs' § 1983 claims for lack of jurisdiction. Finally, the Court DISMISSES Plaintiffs' request for preliminary injunctive relief as moot.

The Court recognizes that the State has made a good faith effort to implement improved and more cost effective health care services through QUEST. Yet Congress has proscribed such discrimination against the blind and disabled even during a transition period leading finally to equal benefits. The State could have included at the outset in QUEST the relatively small number of individuals in Plaintiffs' class, with or without reducing benefits across the board in order to accommodate them. The Court appreciates that this determination comes at a time when the State is suffering a serious shortage of funds. Nevertheless, Congress has mandated nondiscriminatory treatment of the blind and disabled and their rights must be upheld.

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costs the state money, so long as the money is for prospective relief. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (prospective declaratory and injunctive relief in suit against state official sued in official capacity not barred by Eleventh Amendment); *Edelman v. Jordan,* 415 U.S. 651, 661-69, 94 S.Ct. 1347, 1355-58, 39 L.Ed.2d 662 (1974) (discussing how prospective injunctive relief can drain state coffers). Here, however, Plaintiffs' request for injunctive relief is moot.

[13] The State has indicated that QUEST-Net as well as the modifications to QUEST Phase I went into effect as of March 30, 1996.

Pursuant to 28 U.S.C. § 1292(b), the Court is of the opinion that its finding of liability on the part of the State under the Rehabilitation Act and the ADA "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Specifically, if it is held that the State did not violate these acts and that it otherwise is not liable to Plaintiffs for damages, numerous individual determinations of such damages may be avoided. Accordingly, if the Ninth Circuit permits appeal from this order, further proceedings in this action will be stayed pending that appeal.

IT IS SO ORDERED.

APPENDIX 2

Shea T. BURNS-VIDLAK, a minor, by his mother and next friend Honey BURNS; George Cohn, Plaintiffs-Appellees,

v.

Susan CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; The State of Hawaii, Defendants-Appellants.

No. 97-16329.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 4, 1998.

Decided Jan. 22, 1999.

Girard D. Lau, Deputy Attorney General, Honolulu, Hawaii, for the defendants-appellants.

Shelby Anne Floyd and Bradford L. Tannen, Alston, Hunt, Floyd & Ing, Honolulu, Hawaii, for the plaintiffs-appellees.

Gregory B. Friel, United States Department of Justice, Washington, D.C., for the amicus.

Appeal from the United States District Court for the District of Hawaii; Alan C. Kay, District Judge, Presiding. D.C. No. CV-95-00892-ACK.

Before: ALFRED T. GOODWIN, ROBERT R. BEEZER and T.G. NELSON, Circuit Judges.

BEEZER, Circuit Judge:

Susan Chandler, in her official capacity as the director of the Department of Human Services of the State of

Hawaii, and the State of Hawaii [collectively hereinafter "the State"] appeal the denial of their motion for partial summary judgment on the question whether punitive damages are available against a state under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (1994) [hereinafter "Title II"], and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994) [hereinafter "Section 504"]. We dismiss this appeal for lack of subject matter jurisdiction.

I

This suit involves a challenge under Title II and Section 504 to Hawaii's QUEST[1] health care program. Burns-Vidlak claims that the categorical exclusion of blind and disabled persons from participation in the QUEST program prior to April 1, 1996 constituted unlawful discrimination in violation of Title II and Section 504. Burns-Vidlak originally filed this action solely against Susan Chandler, in her official capacity as the director of Hawaii's Department of Human Services. *See Burns-Vidlak,* 939 F.Supp. at 766. The district court granted partial summary judgment in favor of Burns-Vidlak, holding, as a matter of law, that Hawaii's exclusion of blind and disabled individuals from the QUEST program violated Title II and Section 504. *See id.* at 771-73. The

[1] The QUEST program represents Hawaii's attempt to "integrate [ ] the preexisting fee-for-service health care plans utilized for recipients under Medicaid, AFDC, SHIP, and GA programs. Under QUEST these recipients will now receive health care through privatized managed-care health care providers rather than on a fee-for-service basis." *Burns-Vidlak v. Chandler,* 939 F.Supp. 765, 767 (D.Haw.1996).

court further held, and Hawaii conceded, that monetary damages are available to compensate injuries caused by Hawaii's violation of Title II and Section 504. *See id.* at 773, 770.

The district court subsequently allowed Burns-Vidlak to amend his complaint to add the State of Hawaii as a defendant and to seek punitive damages against both defendants. The State then moved for partial summary judgment, claiming that the Eleventh Amendment[2] shields it from exposure to punitive damages under Title II and Section 504. The district court denied the State's motion and the present appeal followed.

II

In general, only final judgments of a district court may be reviewed on appeal.[3] *See Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989). A district court's decision in a civil case is final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *California v. Campbell,* 138 F.3d 772, 776 (9th Cir. 1998) (quoting *Catlin v. United States,* 324 U.S. 229, 233,

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. This withdrawal of jurisdiction also shields unconsenting states from suits brought in federal court by its own citizens. *See Edelman v. Jordan,* 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[3] "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . . " 28 U.S.C. § 1291 (1994).

65 S.Ct. 631, 89 L.Ed. 911 (1945)). As the State acknowledges, the district court's order denying its motion for partial summary judgment is not a "final decision" under 28 U.S.C. § 1291. Accordingly, the State urges the panel to ground its subject matter jurisdiction in the collateral order doctrine as articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

The *Cohen* collateral order doctrine is "a narrow exception to the normal application of the final judgment rule," *Midland*, 489 U.S. at 798, 109 S.Ct. 1494, which "recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available," *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987). The collateral order doctrine permits an appeal from a non-final judgment provided three criteria are satisfied: the "order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Midland*, 489 U.S. at 799, 109 S.Ct. 1494 (internal quotation marks omitted). The State bears the burden of demonstrating that all three requirements are fulfilled. *See Stringfellow*, 480 U.S. at 375, 107 S.Ct. 1177.

The Supreme Court has emphasized that the conditions for collateral order appeal are to be stringently applied to ensure that this narrow exception "never be allowed to swallow the general rule" requiring a judgment to be final prior to appeal. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). We therefore determine the applicability of the

collateral order doctrine "without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (internal citation and quotation marks omitted).

We find it unnecessary to address the first two criteria of the *Cohen* test because we conclude that the State has failed to satisfy the third criterion. The State claims that, in light of *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), the district court's determination that punitive damages are available against the State under Title II and Section 504 is effectively unreviewable on appeal. The State is mistaken.

In *Metcalf & Eddy,* the Supreme Court held that states may invoke the *Cohen* collateral order doctrine to appeal immediately a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. *Id.* at 141, 113 S.Ct. 684. The Court grounded its holding in the recognition that the Eleventh Amendment "confers an immunity from suit [in federal court]"[4] and that this protection would be " 'effectively lost if a case is erroneously permitted to go to trial.' "[5] *Id.* at 144, 113 S.Ct. 684 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105

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[4] *See also Alaska v. United States,* 64 F.3d 1352, 1355 (9th Cir.1995) ("[T]he Eleventh Amendment . . . allow[s] one sovereign entity the right to avoid, altogether, being subjected to litigation in another sovereign's courts.").

[5] *See also Sofamor Danek Group, Inc. v. Brown,* 124 F.3d 1179, 1183 n. 2 (9th Cir.1997) ("[T]he central benefit of [Eleventh Amendment] immunity, the right not to stand trial in the first instance, is effectively lost if a case is erroneously permitted to proceed to trial.").

S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Put differently, a district court's denial of a state's entitlement to Eleventh Amendment immunity is "effectively unreviewable on appeal from a final judgment," *Midland,* 489 U.S. at 799, 109 S.Ct. 1494 (internal quotation marks omitted), since the harm to the state's "dignitary interests" in not being haled into another sovereign's court in the first instance cannot be undone, *Metcalf & Eddy,* 506 U.S. at 146, 113 S.Ct. 684.

In the instant case, the State is not claiming sovereign immunity from suit in federal court.[6] In fact, the state concedes that it is subject to suit, and answerable in money damages, in federal court on the appellees' Title II and Section 504 claims. *See Burns-Vidlak v. Chandler,* 939 F.Supp. 765, 770 (D.Haw.1996). Rather, the State invokes the Eleventh Amendment merely as a defense to liability for punitive damages under Title II and Section 504. But a "defense to the payment of money . . . is far removed from the kind[ ] of immunit[y] from the judicial process involved

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[6] Even if the State *were* claiming Eleventh Amendment immunity from suit in federal court, the plain language of the Rehabilitation Act and the Americans with Disabilities Act ["ADA"] makes it clear that Congress has unequivocally abrogated the states' immunity from suit in federal court under those statutes. *See* 42 U.S.C. § 2000d-7(a)(1) (1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . . ") and 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]."). *See also Clark v. California,* 123 F.3d 1267, 1269 (9th Cir.1997) ("Congress has unequivocally expressed its intent to abrogate the State's immunity [from suit in federal court] under both the ADA and the Rehabilitation Act.").

in *Metcalf & Eddy. . . .* " *Pullman Constr. Indus., Inc. v. United States,* 23 F.3d 1166, 1169 (7th Cir. 1994). "The foundation for the interlocutory appeal authorized by [*Metcalf & Eddy*] is the existence of a right not to be a litigant. . . . Once the [state] defendants concede that the litigation is proper, they undermine any claim of entitlement to an interlocutory appeal." *Mercer v. Magnant,* 40 F.3d 893, 896-97 (7th Cir. 1994).

Indeed, the Supreme Court has made it clear that a potentially "erroneous ruling on liability may be reviewed effectively on appeal from final judgment."[7] *Swint v. Chambers County Commission,* 514 U.S. 35, 43, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Thus, the State has failed to satisfy the third criterion of the *Cohen* test, rendering the district court's order denying the State's motion for partial summary judgment an unappealable collateral order. APPEAL DISMISSED.

[7] We have expressed a similar view in the context of federal sovereign immunity: "Because federal sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed." *Alaska v. United States,* 64 F.3d 1352, 1356 (9th Cir.1995).

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD K. LOVELL, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	Nos. 98-16545; 99-15930 D.C. No. CV-97-01136-BMK
DOUGLAS D. DELMENDO, an incapacitated person, by his appointed guardian-Zosima Orillo Delmendo, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	Nos. 98-16548; 99-15928 D.C. No. CV-97-00531-BMK (Filed May 18, 2001)

HELEN Y. HIRATA, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	No. 99-15554 D.C. No. CV-97-00503-BMK
IN RE: QUEST COMPENSATORY DAMAGE CASES	No. 99-15670 D.C. No. CV-97-00489-BMK
ALBERT LUM HO, SR., Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	ORDER

Before: D.W. NELSON, KOZINSKI, and W. FLETCHER, Circuit Judges

* * *

Defendants-appellants are directed to file an opening brief, not to exceed 15 pages, within 45 days of this order,

directed to the question of sovereign immunity under the Eleventh Amendment in light of cases decided since the original appellate briefing in these cases.

Plantiffs-appellees are directed to file a single opposing brief, not to exceed 15 pages, within 30 days of filing by the defendants-appellants.

* * *